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No. 82-317

In the Supreme Court of the United States

OCTOBER TERM, 1982

JAMES KNIGHT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court properly admitted co-conspirator statements into evidence at petitioner's trial.

2. Whether both courts below properly concluded that petitioner's trial counsel did not suffer from a conflict of interest that adversely affected their representation of petitioner.

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OPINIONS BELOW

The initial opinion of the court of appeals (Pet. App. 12a-15a) and opinion of the court of appeals following remand for an evidentiary hearing (Pet. App. 15a-17a) are not reported. The memorandum opinion of the district court (Pet. App. 4a-11a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 1982. The petition for a writ of certiorari was filed on August 20, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Kentucky, petitioner was convicted on three counts of wire fraud (18 U.S.C. 1343), four counts of transporting in interstate commerce goods taken by

fraud (18 U.S.C. 2314), two counts of inducing persons to travel in interstate commerce in order to defraud them (18 U.S.C. 2314), and one count of conspiracy to commit these offenses (18 U.S.C. 371).[1] He was sentenced to five years' imprisonment and was fined $10,000. The court of appeals affirmed (Pet. App. 1a-2a, 12a-17a).

1. The evidence at trial, the sufficiency of which is not challenged here, showed that petitioner, along with co-defendants Eugene Alley, Robert Taylor, and Wayne Drewry, and co-conspirators Vernon Mahana and J.R. Durham, conspired in 1977 to defraud several lessors and mortgagors of heavy equipment. They did so either by purchasing companies that possessed such leased or mortgaged equipment or by purchasing the equipment itself; they then resold the equipment in an attempt to defeat the mortgagors' or lessors' interests.

In January 1977, Alley and Durham discussed a scheme in which they would buy mining companies and dispose of their equipment, thereby defrauding the creditors of the equipment. They began with the Padco Coal Company in Barbourville, Kentucky (C.A. App. 44-45, 47).[2] In February 1977, using money furnished by Alley, Durham purchased two pieces of Padco's equipment for $10,000 and agreed to assume Padco's debts on the equipment (*id.* at 48, 52-54, 59, 178-181, 245-246). After co-defendant Taylor

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[1]Petitioner was acquitted on one count of mail fraud, one count of wire fraud, two counts of inducing persons to travel in interstate commerce in order to defraud them, and one count of transporting goods taken by fraud. Three co-defendants stood trial with petitioner. Wayne Drewry was convicted on the same counts as petitioner; Robert Taylor was convicted on those counts plus an additional wire fraud count. Their convictions were affirmed with petitioner's. A third co-defendant, Eugene Alley, was convicted on all counts of the indictment and did not appeal his conviction.

[2]"C.A. App." refers to the appendix filed in the court of appeals.

removed the equipment from the Padco site to Alley's lot, Durham transferred title to a bulldozer to Alley's corporation. That bulldozer was encumbered by a security agreement with Westinghouse Credit Corporation (*id.* at 55, 58, 181, 246, 252-256). Alley then sold the bulldozer to an auctioneer in Knoxville, Tennessee (*id.* at 259-260). Durham and Taylor sold the second piece of Padco equipment, which likewise was subject to a security agreement, to another coal company for $39,000 (*id.* at 57-58, 60). Durham ultimately realized $30,000 from these two sales, and Taylor and Alley realized $4,000 and $5,000, respectively (*id.* at 61, 229-232).[3]

On April 20, 1977, Vernon Mahana purchased the stock of High Carbon Coal, located in Elliott County, Kentucky (C.A. App. 367-368). Five days earlier, however, Mahana had sold two bulldozers owned by High Carbon to Alley, who immediately sold them for $120,000 (*id.* at 295-300, 304). Using that money, Mahana paid $75,000 on April 20 to the owner of High Carbon and $15,000 to that company's mortgager in order to give the appearance of a good faith purchase (*id.* at 103, 367-368, 370-371). That transaction was completed at 4:00 p.m.; by that evening, the conspirators removed High Carbon's heavy equipment (*id.* at 371-373). Taylor and Durham removed some equipment—in addition to the two bulldozers already sold—and Drewry repaired a bridge that was damaged in the process (*id.* at 446-447). Taylor, Alley, and Mahana ultimately sold four pieces of High Carbon equipment to various buyers (*id.* at 303-307, 348-349, 369, 382-385, 388-389, 392-397).

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[3]Durham later sold his corporation to a fictitious corporation so that he could escape liability for Padco's debts on the equipment (C.A. App. 64-66).

The final aspect of the scheme focused on the J & S Coal Company. Mahana, at the behest of Alley, Taylor, and Drewry, purchased the company, using a phony corporation as a front (C.A. App. 400, 455, 457, 479). Alley furnished more than $50,000 used for the purchase (*id.* at 362, 406-407, 455-456, 458-461).[4] Petitioner received three of the four pieces of equipment that the conspirators secured from J. & S. Though Mahana executed a bill of sale purporting to sell the equipment to petitioner for $70,500, petitioner never paid anything for the goods (*id.* at 464-467).[5] Instead, petitioner paid $4,000 each to Mahana and Drewry for their roles in the scheme (*id.* at 462).

2. Prior to trial, the prosecutor discovered that a trial outline he had prepared, as well as a transcript of Durham's grand jury testimony, both of which he apparently had left at a local jail after an interview with Durham, were missing (Pet. App. 5a). The day after the jury was selected, but almost a week before trial was to begin, the transcript was discovered at the home of co-defendant Alley. Alley and his wife were then charged with theft of government property (*id.* at 5a-6a). The government also questioned defense counsel, all of whom denied any knowledge of the transcript (*id.* at 7a). After the jury returned its verdict, the court asked the government to investigate the matter further (*ibid.*). Several counsel, including petitioner's attorneys, then admitted that they had seen the documents. Some time after petitioner was sentenced, the district court concluded that

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[4]Mahana also testified that petitioner's interest in an automobile speedway in Corbin, Kentucky, was involved in the J & S purchase (see C.A. App. 452, 480-481).

[5]A Westinghouse Credit Corporation employee later saw one piece of equipment at petitioner's speedway. He placed a tag on it to reflect Westinghouse's ownership interest and directed that the equipment not be moved. When he returned, however, the piece of machinery was gone (C.A. App. 412-415, 424-425).

there were no grounds for contempt citations or other charges. The government also dropped the theft charges against Alley and his wife (*id.* at 7a-8a).

3. On appeal, the court of appeals rejected several of petitioner's claims, including his contention that Durham's testimony was erroneously admitted under the co-conspirator exception to the hearsay rule (Pet. App. 12a-14a). The court of appeals remanded for further inquiry, however, concerning petitioner's claim that his attorneys had a conflict of interest at trial because they were aware that they were under investigation in connection with the missing government documents (*id.* at 14a-15a).

On remand, the district court conducted an extensive hearing on the allegation of a conflict of interest. Following the hearing, the district court found that petitioner's attorneys had no conflict of interest at trial, but that, even if they did, their performance was not adversely affected as a result. Although the court concluded that counsel were aware of the investigation of the missing transcript, in the court's view their predicament was no different from that facing any attorney who committed a possibly contemptuous act and awaited its final determination at the close of trial (Pet. App. at 9a-10a). The district court also concluded that petitioner's attorneys were not inhibited in their representation of petitioner (*id.* at 9a). On appeal after this remand, the court of appeals affirmed petitioner's conviction, finding that there was no conflict of interest that affected his attorneys' performance at trial (*id.* at 16a-17a).

ARGUMENT

1. Petitioner contends (Pet. 6-10) that the court below erred in approving the method employed by the district court in admitting into evidence various co-conspirators' statements. This Court denied the petition for a writ of certiorari filed by petitioner's co-defendant, Robert Taylor,

seeking review of the court of appeals' decision on this same ground, *Taylor* v. *United States*, cert. denied, 454 U.S. 1086 (1981), and petitioner has offered no reason why certiorari nevertheless should be granted on that issue here. In any event, his claims are without merit.

a. Petitioner contends (Pet. 7, 8-9) that review is warranted in this case on the question whether hearsay statements themselves may be considered in determining a defendant's participation in the charged conspiracy. Whatever the merits of that issue in other settings, however, it is clear that petitioner's connection to the conspiracy in this case was based on evidence independent of any co-conspirator's hearsay statements. As petitioner admits (*id.* at 4), his participation in the conspiracy was shown by the fact that he received three pieces of heavy equipment from the J & S Coal Company transaction and that he paid Mahana and Drewry for their assistance in obtaining the equipment (see C.A. App. 462, 464-467). Nor did the district court state that it was relying on the hearsay statements themselves in finding the statements admissible (*id.* at 482-483). Under these circumstances, it is unnecessary to consider petitioner's claim of conflict in the circuits on the question of the consideration of the statements themselves.

b. Petitioner also argues that the decision below conflicts with those of the Fifth and Tenth Circuits that, he contends, require the government to prove the existence of a conspiracy prior to the introduction of co-conspirator statements. But those decisions (*United States* v. *James*, 590 F. 2d 575 (5th Cir) (en banc), cert. denied, 442 U.S. 917 (1979); and *United States* v. *Stipe*, 653 F. 2d 446 (10th Cir. 1981)) do not forbid the alternate order of proof allowed by the district court here. In fact, in *James*, while stating that the preferred order of proof was for the existence of the conspiracy and the defendant's participation in it to be established

by independent evidence first, the court specifically stated that the order of proof in a conspiracy case is ultimately for the trial court to determine. 590 F. 2d at 582. Moreover, failure to follow the preferred order of proof is not a basis for reversal under *James* if the existence of the conspiracy and the defendant's participation in it are proven by a preponderance of the evidence before the close of trial. See *United States* v. *Whitley*, 670 F. 2d 617, 620 (5th Cir. 1982); *United States* v. *Ricks*, 639 F. 2d 1305, 1310 (5th Cir. 1981).

The Tenth Circuit in *Stipe* merely reiterated *James*' preference that independent evidence of the conspiracy and a defendant's participation in it be introduced prior to the co-conspirator's statements. 653 F. 2d at 449. That opinion does not, however, foreclose a trial court from exercising its discretion in appropriate cases to allow the order of proof utilized here (see *United States* v. *Radeker*, 664 F. 2d 242, 244 n.3 (10th Cir. 1981)) or suggest that reversal of the conviction must follow if the trial court takes another approach.

By the same token, the Sixth Circuit has not adopted a contrary preference. In its opinion in *United States* v. *Vinson*, 606 F. 2d 149, 152-153 (1979), cert. denied, 444 U.S. 1074 (1980), the Sixth Circuit held that the district court may require proof by independent evidence first, may admit the hearsay subject to later connecting up, or may even hold a "mini-hearing" prior to trial on the question. This claim therefore does not warrant review.

2. Petitioner also argues (Pet. 10-15) that the courts below incorrectly determined that his attorneys did not have a conflict of interest at trial that interfered with their performance. Both courts below resolved this essentially factual claim against petitioner, however, and there is no need to review it further. *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635-636 (1967).

In keeping with the requirements of *Wood* v. *Georgia*, 450 U.S. 261 (1981), and *Cuyler* v. *Sullivan*, 446 US. 335 (1980), the court of appeals remanded to the district court to conduct a hearing on petitioner's claim of conflict of interest (Pet. App. 14a-15a). The district court complied, holding an extensive hearing at which petitioner's trial counsel, the Assistant United States Attorney who prosecuted the case, and another Assistant United States Attorney who investigated the disappearance of the documents, all testified (*id.* at 16a). The district court then wrote a memorandum opinion in which it stated that it previously had determined that there were no grounds for contempt or other charges against the attorneys and that the criminal charges against co-defendant Alley in the matter had been dropped (*id.* at 8a). The district court also found that no actual conflict of interest resulted from the investigation and that, although petitioner's attorneys were concerned about the investigation, "it appeared not to have affected their ability to represent Knight at any stage of the proceeding" (*id.* at 9a). The court noted in this regard that "[t]here is no evidence which [petitioner] could have produced that was not introduced on his behalf in the trial" (*id.* at 8a). Finally, the district court found that its postponement of resolution of the matter until after trial was no different from any situation in which an attorney might engage in conduct that could give rise to a contempt citation at a later date but in which the court's resolution of the matter is put off until after trial (*id.* at 10a).

The court of appeals, after reviewing the record of the hearing on remand, likewise concluded that petitioner's attorneys suffered from no conflict of interest and that the performance of petitioner's attorneys was not in any event affected. Nothing more was required of the courts below in considering petitioner's claim, and further review by this Court accordingly is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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